

No. 83-1333

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

AMERICAN DREDGING COMPANY,

—against—

Petitioner,

BERKLEY CURTIS BAY CO., INC. and
MORAN TOWING & TRANSPORTATION CO., INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

Should this Court issue a writ of certiorari to review a determination of the Court of Appeals affirming a District Court decision that Petitioner failed to preserve at trial its claim that Respondents' alleged breach of warranty of workmanlike service (hereinafter "WOWS") entitled Petitioner to recover irrespective of its own fault?

STATEMENT PURSUANT TO RULE 28.1

Respondents Berkley Curtis Bay Co., Inc. and Moran Towing & Transportation Co., Inc. are wholly owned subsidiaries of Moran Towing Corporation, a privately held corporation. All companies in the Moran group are wholly owned subsidiaries of Moran Towing Corporation either directly, or through ownership by another wholly owned subsidiary, except for Caribbean Barge Corporation, in which Gulf & Western Industries, Inc. and S.C. Loveland Co., Inc, own minority interests.

TABLE OF CONTENTS

	PAGE
COUNTERSTATEMENT OF QUESTION PRESENTED	i
STATEMENT PURSUANT TO RULE 28.1	ii
TABLE OF CONTENTS.....	iii
TABLE OF AUTHORITIES.....	iv
STATEMENT OF CASE.....	1
PROCEEDINGS IN THE COURTS BELOW.....	2
REASONS FOR DENYING THE PETITION	4
The Petition Should Be Denied Because The Theory Raised In It Was Never Presented To The Trial Court And No Injustice Results From This Conclusion	4
CONCLUSION.....	7

TABLE OF AUTHORITIES

A. Cases	PAGE
<i>Broadway Delivery Corp. v. United Parcel Serv.</i> , 651 F.2d 122 (2 Cir.), cert. denied, 454 U.S. 968 (1981) ..	5
<i>Commissioner v. Duberstein</i> , 363 U.S. 278 (1960)	4
<i>Fairmont Shipping Corp. v. Chevron International Oil Co.</i> , 511 F.2d 1252 (2d Cir.), cert. denied, 423 U.S. 838 (1975).....	6
<i>McAllister v. United States</i> , 348 U.S. 19 (1954)	4
<i>Navieros Oceanikos, S.A. v. S.T. Mobil Trader</i> , 554 F.2d 43 (2d Cir. 1977).....	6
<i>Stevens v. The White City</i> , 285 U.S. 195 (1932)	6
<i>Thomas v. Pick Hotels Corp.</i> , 224 F.2d 664 (10th Cir. 1955).....	6
 B. Statutes, Rules and Regulations	
33 U.S.C. § 1321	5
33 U.S.C. § 1321(g) and (h)	5
46 C.F.R. § 90.05-25	1
46 U.S.C. § 183	2
46 U.S.C. § 185	5
Fed. R. Civ. P. 54(c).....	5, 6

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Statement of the Case

Respondents Berkley Curtis Bay Co., Inc. and Moran Towing & Transportation Co., Inc. (collectively referred to as Moran) are, respectively, the owner and bareboat charterer of *Tug Grace Moran*. Late in the morning of July 31, 1978, *Grace Moran* was dispatched in response to a request from Petitioner American Dredging Company (ADC) to tow *Dredge Pennsylvania* to a sheltered area because of severe weather. *Pennsylvania* was a manned dredge, operating in the ocean about one mile off Rockaway Beach, but she had no certificate required for such operations by 46 C.F.R. § 90.05-25. *Grace Moran*

reached *Pennsylvania* about noon. After making fast, the dredge was towed on a hawser astern toward Rockaway Inlet.

While so proceeding, *Grace Moran* ran aground on a shoal known as Louie's Hump. *Pennsylvania* drifted onto the shoal shortly thereafter and punctured her bottom allowing water to surge into her hull. Simultaneously water from the six foot seas entered through the dredge's open doors. *Pennsylvania* was not fitted with watertight compartments to maintain buoyancy in the event of ingress of water as she should have been for such an off-shore operation.

Thereafter, *Grace Moran* freed herself from the strand and resumed the tow. Approximately five minutes later *Pennsylvania* sank in 30 feet of water. Members of *Pennsylvania's* crew who were washed into the water were all rescued. Approximately 200 tons of fuel and diesel oil from the dredge were spilled, requiring cleanup operations by federal and state government agencies. *Pennsylvania* became a total loss.

Proceedings In The Courts Below

On August 3, 1978 Moran filed a complaint in the United States District Court for the Southern District of New York seeking exoneration from or limitation of liability pursuant to 46 U.S.C. § 183. Various claims were filed, including ADC's claim for loss of *Pennsylvania* and incidental damages.

After a trial before the Honorable Abraham D. Sofaer in October-November, 1981, the District Court rendered a bench decision denying Moran's petition for exoneration and limitation of liability, and finding Moran 65% at fault for the casualty. ADC was held 35% at fault (42a).¹ Liability for all damages was apportioned accordingly. An interlocutory order and judgment was entered on February 1, 1982 (28a-31a).

¹ All page references herein are to the appendix to the petition for certiorari.

Moran appealed from the denial of limitation. ADC cross-appealed, asserting for the first time the theory that Moran's alleged breach of WOWS operated to free it from proportional liability.

On June 28, 1982 the United States Court of Appeals for the Second Circuit affirmed the District Court's determination as to limitation. The Court held that ADC's theory on its cross-appeal was precluded because ADC "did not present that theory at trial or in its post-trial argument" (26a).

ADC petitioned for rehearing from this portion of the order. On September 3, 1982 the Court of Appeals modified its previous order and remanded to the District Court for determination of whether the theory of ADC's cross-appeal was available to ADC and, if so, the merits of this contention (21a).

The remanded issue was submitted to the District Court upon motion by ADC for recovery from Moran of its full damages and indemnification for any liability to third parties. The District Court entered a Memorandum Opinion and Order on February 11, 1983 (10a), holding that ADC's theory and claim concerning the alleged breach of the implied warranty of workmanlike service "was not preserved in the form that it was asserted on appeal" (12a). The District Court observed that in any event the merits of ADC's theory were "tenuous under existing law" (*Id.*). Finally the Court held that ADC would not be subjected to a miscarriage of justice by refusal to consider the theory; on the contrary, "such indemnification [of ADC] would lead to a particularly unjust result given ADC's various omissions, including its failure to obtain a valid certificate for oceangoing operations" (14a).

ADC appealed from the February 11, 1983 Order. On November 21, 1983, the Court of Appeals affirmed the District Court on the waiver issue, finding it unnecessary to reach ADC's other arguments (1a-3a).

REASONS FOR DENYING THE PETITION

The Petition Should Be Denied Because The Theory Raised In It Was Never Presented To The Trial Court And No Injustice Results From This Conclusion.

The District Court, on remand, found that ADC did not claim at trial that Moran's alleged breach of WOWS entitled ADC to full recovery in spite of its own negligence (12a). This finding of fact was required to be affirmed unless it is "clearly erroneous." *McAllister v. United States*, 348 U.S. 19, 20 (1954); *Commissioner v. Duberstein*, 363 U.S. 278, 289-292 (1960). The prior appeals and the petition for rehearing also support affirmance. On ADC's initial cross-appeal, the Court of Appeals held that ADC had waived its claim (26a). After ADC petitioned for rehearing, the Court of Appeals found that the record was sufficiently ambiguous to justify a remand to the District Court (21a). Nothing so clear as to justify reversal can arise out of such an "ambiguous" record.

Indeed, the District Court's finding is the only possible finding supported by the record. Prior to the trial herein, ADC did raise an alleged breach of WOWS in its claim and in the pretrial order. ADC's trial brief addressed the alleged breach of WOWS, contending (1) that it established fault and required a denial of Moran's petition for exoneration, and (2) that it required a denial of Moran's petition for limitation of liability under the personal contract doctrine. At no time did ADC present or make the argument raised first on its cross-appeal, namely that a breach of WOWS precluded findings of comparative fault and proportionate liability. Thus, not only was the claim not preserved at trial, it was never even asserted prior to trial.

As the Court of Appeals noted in its June 28, 1982 order (26a), Judge Sofaer invited further argument or corrections at the outset of his oral opinion (32a). ADC made no subsequent written submission to the District Court on its argument that the breach of WOWS precluded a finding of comparative liability. Rather, ADC availed itself of the Court's invitation to

submit written argument only on the question of dissolution of the injunction under 46 U.S.C. § 185. ADC did not present its current claim until after it filed a cross-appeal on March 30, 1982.

Since ADC failed to preserve at trial its current claim that Moran's alleged breach of WOWS entitled ADC to recover irrespective of its own fault, it could not raise the issue on its original cross-appeal, or its subsequent appeal after the remand. Nor can the claim be raised in ADC's petition here. As stated in *Broadway Delivery Corp. v. United Parcel Serv.*, 651 F.2d 122, 126 (2 Cir.), *cert. denied*, 454 U.S. 968 (1981): "an appellate court will not relieve a party of the effect of its procedural default, except in the most extraordinary circumstances to prevent a miscarriage of justice". As the District Court found on remand, not only is there no miscarriage of justice herein (12a), it "would lead to a particularly unjust result" (14a) to relieve ADC of its procedural default and uphold its current claim.

ADC's comparison of its current position with the position of the United States herein does not withstand scrutiny. In its answer and counterclaim, the United States asserted that it was entitled to recover under the FWPCA, 33 U.S.C. § 1321. Thereafter, in its pre-trial brief, the United States asserted that Moran was liable for its claims on the basis of 33 U.S.C. § 1321(g) and (h). Indeed, the Government specifically asserted that any claims not covered by § 1321(g) fell under subsection (h). This is the same position which was raised in the United States' cross-appeal and which was decided by the District Court upon remand. On the other hand, ADC did not argue in its pre-trial brief, at trial, or in post-trial argument that Moran's alleged breach of WOWS precluded a finding of comparative fault and proportionate liability. Unlike the United States, ADC never argued its current position until its cross-appeal.

ADC's reliance on Rule 54(c) of the Federal Rules of Civil Procedure is likewise to no avail. The simple answer is that ADC is not "entitled" to the relief sought because the District

Court held that the claim was never presented for its consideration (12a), which would be a prerequisite for the last sentence of Rule 54(c) to be of any benefit. Cases cited by ADC in support of its argument are inapposite as they all involve instances where failure to grant relief would result in a miscarriage of justice, whereas in this case the District Court specifically found that no miscarriage of justice would result if ADC were not relieved of its procedural default. Indeed, just the opposite would be true (14a). Furthermore, in *Thomas v. Pick Hotels Corp.*, 224 F.2d 664 (10th Cir. 1955), cited by ADC at page 6 of its Petition, the court held that the complaint stated a claim in contract as well as tort (*Id.*, at 666). In this case ADC never argued, prior to the original cross-appeal, that Moran's alleged breach of WOWS precluded a finding of proportionate fault.

In conclusion, the District Court's finding that ADC failed to preserve its claim that it was entitled to full recovery and indemnity irrespective of its own fault is not clearly erroneous and was properly affirmed by the Court of Appeals. The petition for the writ of certiorari should be denied.²

² ADC asserts two additional reasons for granting its petition which are addressed to the merits of its contention. However, the Court of Appeals only decided the waiver issue, finding it unnecessary to reach ADC's other arguments. Accordingly, Moran has limited its detailed response to the sole issue decided by the Court of Appeals. However, on the merits the District Court noted that ADC's assertion that Moran's breach of WOWS precluded ADC liability was "tenuous under existing law" (12a). Indeed, even if this Court were to adopt the WOWS theory suggested in *Fairmont Shipping Corp. v. Chevron International Oil Co.*, 511 F.2d 1252 (2d Cir.) *cert. denied*, 423 U.S. 838 (1975)—thereby abandoning long-entrenched authority on the duty of tug to tow, *Stevens v. The White City*, 285 U.S. 195, 200-202 (1932)—the Second Circuit has already held that a breach of WOWS in a service contract such as involved here does not preclude a finding of proportionate liability. *Navieros Oceanikos, S.A. v. S.T. Mobil Trader*, 554 F.2d 43, 46-47 (2d Cir. 1977). Thus, even if ADC were to be relieved of its procedural default, its claim fails on the merits.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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